

DUANE A. BOSWORTH, OSB #825077

duanebosworth@dwt.com

TIM CUNNINGHAM, OSB #100906

timcunningham@dwt.com

DAVIS WRIGHT TREMAINE LLP

1300 S.W. Fifth Avenue, Suite 2400

Portland, Oregon 97201-5610

Telephone: (503) 241-2300

Facsimile: (503) 778-5299

Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

AT PORTLAND

PENGUIN GROUP (USA) INC.,

PLAINTIFF,

v.

AMERICAN BUDDHA,

DEFENDANT.

Case No. 3:13-cv-00497-HU

**REPLY REGARDING OBJECTIONS
TO FINDINGS AND
RECOMMENDATIONS CONCERNING
DEFENDANT'S MOTION TO
TRANSFER**

Defendant states that the Magistrate Judge “found that the library defense presents a valid issue for decision”. Defendant’s Response, p. 5. With all due respect, the Magistrate Judge did not decide or analyze that issue.

The *sine qua non* of Defendant’s argument regarding transfer is that it must be able to prove, with live testimony, that it is a “library”. Defendant has not provided any argument about why that is material, however, and the Magistrate Judge did not analyze materiality.

The New York Court of Appeals, in *Penguin Group (USA) Inc. v. American Buddha*, 16 N.Y.3d 295, 946 N.E.2d 159 (2011), succinctly described the matter at issue in this case:

“The complaint alleges that American Buddha published complete copies of [plaintiff’s] works on its two Web sites, making them available free of charge to its 50,000 members and anyone with an internet connection. ...

The crux of Penguin’s copyright infringement claim is not merely the unlawful electronic copying or uploading of the four copyrighted books. Rather, it is the intended consequence of those activities—the instantaneous availability of those copyrighted works on American Buddha’s Web sites for anyone ... with an internet connection to read and download the books free of charge.

[I]t is undisputed that American Buddha’s Web sites are accessible by [anyone] with an Internet connection and, as discussed, an injury allegedly inflicted by digital piracy is felt throughout the United States. ...

[T]he primary aim of the infringer is to make the works available to anyone with access to an Internet connection. ...”

Id at 300, 304, 306 and 306, respectively.

Even if it were stipulated or beyond all question that Defendant is a “library”, which is the only subject of defendant’s proffer, that would not change the infringement issue here. Defendant does not provide this Court with any argument that any library may legally engage in the only conduct at issue. Proof that defendant is a library under 17 U.S.C. § 108 does not add to or subtract from the issue in this case and is not material here.

Defendant’s assertion about the Magistrate Judge’s finding is not correct. With all due respect, the Magistrate Judge did not analyze or decide the issue Defendant describes.

DATED this 28th day of October, 2013.

DAVIS WRIGHT TREMAINE LLP

By s/ Duane A. Bosworth

Duane A. Bosworth, OSB #825077
Tim Cunningham, OSB #100906
Telephone: (503) 241-2300
Facsimile: (503) 778-5299
duanebosworth@dwt.com
Attorneys for Plaintiff